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April 24, 2023

Nasser H. Paydar
Assistant Secretary
Office of Postsecondary Education
U.S. Department of Education
400 Maryland Avenue SW
Washington DC 20024

Submitted via Regulations.gov

Re: Docket ID ED-2023-OPE-0039-0001

Dear Assistant Secretary Paydar:

Thank you for the opportunity to provide input on the topics the Department of Education may include in its negotiated rulemaking pertaining to the Title IV programs of the Higher Education Act.

SPARC is a non-profit advocacy organization that supports systems for research and education that are open by default and equitable by design. Our membership includes more than 200 libraries and academic organizations across the U.S.

We recommend that the Department revisit the provisions under the Cash Management Regulation related to the cost of books and supplies in negotiated rulemaking. Specifically, we urge the Department to significantly revise or remove entirely the language in the Disbursing Funds section which permits institutions to include books and supplies in tuition and fees (34 CFR § 668.164(c)(2)). While this provision was intended to help reduce textbook costs as a barrier to higher education, it has instead instigated a shift in the textbook marketplace that is restricting student choice and putting additional pressure on students' already limited Title IV funds.

<u>Background: The Consequences of Including Books and Supplies in Tuition and Fees</u>

Prior to 2016, institutions were required to get permission from a student or parent to apply Title IV funds to charges for books and supplies, recognizing that students should have a right to shop for the lowest price from sources on and off campus. In 2016, the Department changed longstanding policy in its final Cash Management rule, allowing institutions to count books and supplies as part of tuition and fees under a set of specific conditions. While the regulatory history shows that the Department originally intended to require institutions to justify why these practices were in the best financial interest of students, the final rule omitted that requirement. Under 34 CFR § 668.164(c)(2)(i), institutions can include books and supplies costs in tuition and fees if they have an agreement to offer materials at "below competitive market rates" and have a "policy" allowing students to opt-out—requirements that have not proved meaningful in practice to protect students.

It may not have been the Department's intent to instigate a dramatic shift in the textbook industry, but that has been the net effect of 34 CFR § 668.164(c)(2)(i). Shortly after the rule's publication, the largest corporations in the textbook publishing and bookstore industry began promoting a model known as "Inclusive Access," which automatically bills the cost of digital course content to students' tuition and fees.[1] While the concept of automatic billing was not entirely new, unlocking Title IV funds to pay for Inclusive Access charges made the model significantly more feasible for institutions to pilot—and significantly more appealing for major industry players seeking to recapture sales lost to low and no-cost alternatives.

Marketed as a textbook affordability solution, the Inclusive Access model has proliferated widely throughout the public and private not-for-profit sectors. Originally, Inclusive Access was primarily implemented on a course-by-course basis, where faculty chose whether or not to participate in the program on behalf of their students. Increasingly, this model is expanded to a campus-wide flat rate model (sometimes known as "Equitable Access"), where students are charged a standard fee per credit hour regardless of the market value of the materials they receive. Some studies estimate that as many as one in three students have now been impacted by the Inclusive Access model, although less than three out of five students say they were satisfied with it.[2]

As Inclusive Access programs have become more established, it has become clear that the regulatory requirements of 34 CFR § 668.164(c)(2)(i) are too weak to achieve meaningful protections for students. While institutions can easily establish a "policy" allowing students to opt-out of course material charges, the process may be complex or difficult for students to navigate if they want to take advantage of low or no-cost alternatives.[3] According to a new legal analysis by the Postsecondary Equity & Economics Research Project (PEER), the choice to "opt-out" is often "illusory where institutions and publishers bundle essential online homework with digital textbooks and restrict students from opting out for less than all of their courses."[4]

[1] https://www.insidehighered.com/news/2017/11/07/inclusive-access-takes-model-college-textbook-sales
[2] https://www.nacs.org/nacs-student-watch-report-use-of-digital-course-materials-is-up
[3] https://thesandb.com/40368/article/students-express-frustration-with-online-textbook-charges/
[4] https://www.defendstudents.org/peer/2023-4-3-PEER-Returns-Textbooks-FNL.pdf

Similarly, there seem to be manifold interpretations of what it means to establish an arrangement to offer materials at "below competitive market rates." A 2020 report by U.S. PIRG analyzed Inclusive Access contracts and found numerous problematic provisions, including quotas designed to penalize institutions if too many students opt out, hidden pricing structures, and the lack of any caps on future price increases.[5] Moreover, contracts commonly define discounts in terms of publisher list prices, which may not account for the steep discounts or free options available through the used book market, library reserves, or other affordable options that students could access if given the choice.

Perhaps most significantly, institutions that have implemented campus-wide Inclusive Access programs do not appear to be delivering lower costs. Based on publicly-available contracts with major bookstore vendors, the price of campus-wide Inclusive Access programs ranges $20-26 per credit hour, or $600-780 per year.[6] In contrast, the National Association of College Stores claims that the average undergraduate spent only $339 on course materials during the 2021-22 academic year.[7] If Inclusive Access programs are not delivering significant savings now, it is unlikely they will in the future—over the last two decades, textbook prices have more than doubled, and are only likely to continue increasing.[8]

Recommendations: Remove or Significantly Revise 34 CFR § 668.164(c)(2)(i)

We recommend that the Department revisit this regulation in its upcoming rulemaking to consider removing 34 CFR § 668.164(c)(2)(i) or, at a minimum, significantly revising it to strengthen the conditions for including books and supplies as part of tuition and fees in order to protect students. Specific recommendations for protecting students include:

- Require that institutional opt-out policies offer students the opportunity to acquire their materials from a source not affiliated with the institution. If students cannot acquire their materials elsewhere, opting out is not really an option.
- Provide a clear definition of "below competitive market rates" that specifies like-for-like standards (i.e., the same material in the same format under similar terms and conditions).
- Clarify that the definition of "below competitive market rates" applies to each individual student, not to students on average. A student should not be charged a fee that exceeds the market value of the materials they receive. Otherwise, their Title IV funds could be subsidizing the more expensive materials of other students.
- Require institutions to disclose the methodology they use to ensure materials are provided at below market rates to students and explain why this model is in their best financial interest.

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[5] https://pirg.org/resources/automatic-textbook-billing-2/

[6] https://sparcopen.org/our-work/automatic-textbook-billing/contract-library

[7] https://www.nacs.org/nacs-student-watch-report-course-materials-spending-dropped

[8] https://www.inclusiveaccess.org/facts/savings-or-spin

- Require institutions to document on a current basis that materials are provided below market rates.
- Require that any entity involved in servicing a program implemented under 34 CFR § 668.164(c)(2) operate on a fee-for-service model and not a revenue sharing or commission model.

It is important to note that 34 CFR § 668.164(c)(2) does not authorize or prohibit Inclusive Access programs in general, but only concerns whether or not Title IV funds can be applied to Inclusive Access charges without first obtaining authorization from students or parents. We therefore encourage the Department to disregard the prevalence of this model in its decision making with respect to the regulation.

Conclusion

At a time when the purchasing power of Title IV funds continues to decline, it is vital for the Department to ensure accountability in charges automatically applied and promote student choice in how they use their money. It is clear that the adoption of 34 CFR § 668.164(c)(2) has swung the pendulum too far in one direction, and it is incumbent upon the Department to take action to restore student choice, transparency, and accountability in the textbook marketplace.

Thank you again for the opportunity to submit comments and please do not hesitate to contact us for further details or supporting information.

Sincerely,

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